

**IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION**

STATE OF INDIANA, <i>ex. rel.</i> , CHRIS)	CAUSE NO. 1:09-CV-1506 SEB-TAB
NAYLOR, INDIANA SECURITIES)	
COMMISSIONER,)	
)	
Plaintiff,)	
)	
v.)	
)	
INDIANA STATE TEACHERS)	
ASSOCIATION, ISTA INSURANCE)	
TRUST, ISTA FINANCIAL SERVICES)	
CORPORATION, ISTA WELFARE)	
BENEFITS TRUST, ISTA)	
ADMINISTRATIVE SERVICES)	
CORPORATION, and NATIONAL)	
EDUCATION ASSOCIATION,)	
)	
Defendants.)	

PROTECTIVE AND ELECTRONIC DISCOVERY ORDER

The Parties in this matter hereby state as follows:

WHEREAS, Rule 26(c) of the Federal Rule of Civil Procedure provides for the issuance of protective orders limiting the disclosure of information in appropriate circumstances and upon good cause shown;

WHEREAS, the parties are initiating the discovery process; and

WHEREAS, during the course of discovery, one or more parties or nonparties may be asked to disclose information and/or documents that the disclosing party regards to be confidential or proprietary.

The Court, having considered this Agreed Protective And Electronic Discovery Order, and being duly advised in the premises, now finds that good cause exists for the issuance of this

order and, therefore, pursuant to Rule 26(C) of Federal Rules of Civil Procedure,

IT IS ORDERED THAT:

1. **Scope of Order.** This Stipulated Protective and Electronic Disclosure Order (“the Order”) governs the use and handling of documents, electronic information in any form (including embedded data and metadata), testimony, interrogatory responses and other information, including all copies, excerpts and summaries thereof (collectively, the “Material”) produced or given by any defendant, plaintiff, or other individual or entity (the “Producing Party”) in pre-trial proceedings in the above-captioned Litigation (“this Litigation”). Material produced in this Litigation shall be used only for the purpose of this Litigation, and not for any other business, competitive, personal, private, public, labor organization, or other purpose whatsoever.

2. **Definition of Confidential Material.**

The Producing Party may designate as “Confidential” any Material that it produces in this Litigation which contains (i) non-public financial, human relations or commercial information, internal strategy or strategic planning information, including but not limited to collective bargaining or legislative strategy, the disclosure of which is believed in good faith by the Producing Party to have the potential for causing competitive or operational harm; (ii) internal communications, research and analysis regarding the Confidential Material identified in subpart (i); and (iii) non-public personnel information or other sensitive personally identifiable information (such as social security numbers, or home addresses), which any party claims in good faith to need protection from disclosure, under the Federal Rules of Civil Procedure and/or other applicable law (“Confidential Material”). The designations will be made by an attorney based on a good faith determination that the document is properly designated confidential.

The Parties submit that the following categories of information are likely to be discoverable in this case, may qualify as confidential, and may be designated as Confidential Material:

- (a) Financial data and information. Confidential financial data and information may include, but is not limited to, non-public financial statements, account balances, audit statements, investment reports, budgets, loan agreements, and information pertaining to revenue streams and expenditures.
- (b) Collective bargaining information. Confidential collective bargaining information may include, but is not limited to, bargaining strategy, analysis, and priorities.
- (c) Legislative information. Confidential legislative information may include, but is not limited to, non-public legislative strategy, initiatives, goals, and analysis.
- (d) Human Resource information. Confidential human resource information may include, but is not limited to, non-public compensation arrangements, compensation structures, individual employment files, and payroll information.
- (e) Program or Product information. Confidential program or product information may include, but is not limited to, non-public documents reflecting analyses or assessments of current, past, or future programs or products that are offered to members or consumers.

3. **Designation of Confidential Material.** Confidential Material will be designated in conformance with Paragraph 7 of this Order; provided, however, that any and all Material containing non-public personnel information or sensitive personally identifiable information (such as social security numbers or home addresses) shall be subject to this Order, whether or not that information has been so designated. As to Material produced by a non-party in response to a subpoena in this Litigation, such Material shall initially be treated as Confidential Material for a period of fifteen (15) calendar days after it is produced. If a Party and its counsel believe in good faith that any such Material contains information as to which an Order restricting a party or person from disclosing the information to other persons who are not parties to the Litigation would be warranted under this Order, for purposes of this Order that Party shall be considered a Producing Party with respect to that Material and shall have the right to designate the Material as Confidential in accordance with this Order. If no such designation is made, Material produced by a non-party in response to a subpoena shall cease to be treated as Confidential once fifteen (15) calendar days have elapsed after its production.

4. **Persons Who May Access Confidential Material.** Except as provided in Paragraph 7, absent written consent from the Producing Party or unless otherwise directed by the Court, Confidential Material, and the information contained therein, may be disclosed only to the following persons and only to the extent necessary to perform their work:

- (a) Employees of Parties to this Litigation who are actively involved in assisting with the prosecution or defense of this Litigation;
- (b) Outside counsel of record for the Parties;
- (c) In-house counsel for the Parties who are actively involved in assisting with the prosecution or defense of this Litigation;

- (d) Outside experts or consultants who are not regular employees of a Party but are retained on behalf of any of the Parties by their outside counsel to assist in the preparation of this case;
- (e) Outside photocopying, graphic production services or litigation support services employed by the Parties' counsel to assist in this Litigation, and computer service personnel performing duties in relation to a computerized litigation system;
- (f) The Court, court reporters, jurors, videographers, stenographers, and court personnel; and
- (g) The direct staff of, and any contract support personnel employed or retained by, any of the foregoing persons, provided that such persons are actively involved in assisting with the prosecution or defense of this Litigation.

5. Application of this Order to Persons With Access to Confidential Material.

Each person given access to Confidential Material shall be advised that the Confidential Material is being disclosed pursuant to and subject to the terms of this Order and may not be disclosed or used other than as set forth in this Order.

- (a) Before any person described above in Paragraph 4(d) is given access to Confidential Material, that person must read and agree in writing, by signing an acknowledgment in the form attached hereto as Exhibit A, to be bound by the provisions of this Order.
- (b) Before any other person described in Paragraph 4 is shown any Confidential Material, that person must be shown a copy of this Order and instructed that he or she is bound by its provisions.

6. **Filing Documents Containing Confidential Material.** Confidential Material may be filed with the Court. A Party intending to file Confidential Material with the Court, or to disclose information contained within Confidential Material in a filing with the Court, shall provide at least five (5) days advance notice to the Producing Party of its intent to file any documents that have been designated "Confidential." Should the Producing Party have good cause to seal from public view any Confidential Material that is intended to be filed with the Court, that party must file a separate and specific motion for such protection, and the motion will only be granted for good cause shown and if consistent with Seventh Circuit case law regarding filing materials under seal. The Parties acknowledge that other parties and any member of the public may challenge the "under seal" designation containing Confidential Material on a document that is filed with the Court. Documents filed under seal shall be filed in accordance with Local Rule 5.3. Furthermore, the sealed material, information or papers shall plainly state on the first page of any bound or stapled document "CONFIDENTIAL - FILED UNDER SEAL" and shall be filed only in sealed envelopes on which shall be endorsed the caption of this action, and a statement substantially in the following form:

CONFIDENTIAL

This envelope contains documents that are subject to a Protective Order entered by the Court in this action. This envelope shall neither be opened nor the contents revealed except by Order of the Court.

7. **Production of Documents and Other Material Containing Confidential Material.** The designation of Confidential Material for the purposes of this Order shall be made in the following manner:

- (a) In the case of Confidential Material disclosed in documents (including those produced in electronic form and electronic data reduced to hardcopy

form) and written discovery responses, by affixing the legend “Confidential – Naylor/ISTA Litigation” to each page containing any Confidential Material.

- (b) In the case of Confidential Material disclosed in electronic form of any kind (including embedded data and metadata) (collectively, “Electronic Data”), in addition to complying with subparagraph (a), counsel for the Producing Party will also mark, where feasible, the disk, tape, or other electronic media on which the Electronic Data is produced with the appropriate designation. Whenever any Confidential Electronic Data is copied, all copies shall be marked with the appropriate designation. If Electronic Data is designated as Confidential, any embedded data and metadata that is retrievable from the Electronic Data so designated shall also be treated as Confidential.
- (c) In the case of Confidential Material, and/or the information contained therein, disclosed in depositions or other pretrial testimony: (i) by a statement on the record, by counsel, at the time of such disclosure, or (ii) by written notice sent to all counsel of record for the Parties within thirty (30) calendar days after receipt of the transcript of the deposition. All transcripts shall be considered Confidential and subject to this Order until expiration of that thirty-day period. All videotapes of depositions shall be clearly labeled Confidential if appropriate pursuant to this Order.
- (d) To the extent that a person described in Paragraph 4 creates, develops, establishes, or otherwise maintains, on any computer, network, disk, tape, or other digital or analog machine-readable device, any information, files,

databases or programs that contain Confidential Material, such person shall take all necessary steps to ensure that access to any Confidential Material is restricted to those persons who, by the terms of this Order, are allowed access to the Material.

- (e) The failure to stamp a document as Confidential shall not be deemed a waiver of a claim of confidentiality. The Producing Party shall give written notice to the Party receiving the Confidential Material promptly after the omission is discovered, and the receiving Party shall thereafter treat that Material as Confidential in accordance with this Order.

8. **Use of Confidential Material at Depositions.** Counsel for any Party may use documents or Electronic Data designated as Confidential, and/or information contained therein, to examine fact witnesses (a) who are currently employed by the Producing Party, (b) who were employed by the Producing Party at the time the Material was created, (c) who created or received the Material (other than through production of the Material in this Litigation), (d) who have agreed in writing prior to the deposition, served on Counsel for all Parties, to be bound by the provisions of Exhibit A to this Order, or (e) who have agreed in writing at the time of the deposition, to be bound by the provisions of Exhibit A to this Order. With respect to depositions of any other witnesses who do not agree to be bound by Exhibit A, if the Producing Party is a Party to this Litigation, the Party wishing to use documents or Electronic Data designated as Confidential, and/or information contained therein, shall endeavor to reach agreement with the Producing Party. If an agreement cannot be reached, the Parties shall attempt to reach the Magistrate Judge for resolution. If the Magistrate Judge cannot be reached, the Confidential Material and information contained therein may not be introduced or disclosed to the witness. If the Producing Party is not a Party to this Litigation, the Party wishing to use documents or

Electronic Data designated as Confidential, and/or information contained therein, shall attempt to reach the Producing Party and obtain agreement as to the use of the Confidential Material. If an agreement cannot be reached, the Parties shall attempt to reach the Magistrate Judge for resolution. If the Magistrate Judge or the Producing Party cannot be reached, the Confidential Material and information contained therein may not be introduced or disclosed to the witness at that time.

9. **Use of Confidential Material at Trial or Hearing.** Any party who intends to use materials designated as Confidential Material, or to disclosed information contained within Confidential Material, at a hearing in open court shall provide the Producing Party five (5) days notice in advance of the hearing so as to provide the Producing Party an opportunity to object to the use or disclosure of the Confidential Material, and/or the information contained therein, in advance of the hearing and to file a motion to seal the materials if the parties are unable to reach an agreement on the use of such Material. The use of Confidential Material, and/or information contained therein, at trial shall be governed by the pretrial Order. This Order shall not limit any Party's right to use any Confidential Material, and/or the information contained therein, at trial subject to appropriate procedures to safeguard trade secrets and Confidential Material, and/or the information contained therein.

10. **Previously Obtained Material.** Nothing in this Order shall preclude any Party to this Order or its attorney from showing a document designated as Confidential Material to an individual who prepared, authored, received, or reviewed the material prior to the filing of this action.

11. **Parties May Use Their Own Confidential Material.** Nothing in this Order shall affect a Party's use or disclosure of its own documents in any way; provided that any restrictions imposed by federal or state law will apply to use of non-public personal information.

12. **Removal of Confidential Designation.** Any Party may object to the designation of any Material as Confidential by giving written notice to the Producing Party that it objects to the designation. Such notice shall specifically identify the Material at issue. The Objecting and Producing Parties shall confer in good faith to resolve any such dispute. If the Parties are unable to resolve the dispute, the Producing Party may apply to the Court for a ruling that the Material is appropriately designated for purposes of discovery, giving notice to the all Parties. If no such motion is made within thirty days of the written notice objecting to the designation, then the designation will be deemed withdrawn. If such a motion is made, the Producing Party will have the burden to establish that the designation is proper. Until the Court rules on the motion, the Material shall be treated as Confidential.

13. **Modification of the Order.** This Order shall not prevent a Party or member of the public from applying to the Court, for relief therefrom, or for further or additional Orders, nor shall it prevent the Parties from agreeing and stipulating to modifications of this Order.

14. **Extending Protections of This Order to Non-Parties.** Any non-party to this Litigation who produces any Material in this Litigation may also be afforded the protections of this Order upon written notice delivered to the counsel of record for the Parties to this Order, agreeing to the terms of this Order.

15. **Third Party Requests for Confidential Material.** If any person receiving Material covered by this Order is subpoenaed in another action or proceeding, served with a document demand, or otherwise requested to provide Material covered by this Order, and such subpoena, document demand, or request seeks Material which was produced or designated as Confidential Material by any Producing Party, the person receiving the subpoena, document demand, or request shall give written notice immediately to counsel for the Producing Party and

shall, to the extent permitted by law, withhold production of the Material until any dispute relating to the production of such Material is resolved.

16. **Court Retains Jurisdiction.** This Order shall survive the termination of this Litigation. This Court expressly retains jurisdiction over this action for enforcement of the provisions of this Order following the final resolution of this Litigation.

17. **Return or Destruction of Confidential Material.** Within sixty (60) calendar days of the termination of this action, including all appeals, all Confidential Material supplied by any Producing Party, including any copies thereof and any deposition testimony (whether in transcript or videotape form) designated as Confidential, shall be returned to the Producing Party or shall be destroyed and its destruction certified.

18. **No Waiver of Privilege.** The production by a party or non party of any privileged or work product materials or information shall not be deemed to be: (a) a general waiver of the attorney-client privilege, the work product doctrine or any other applicable privilege or protection; (b) a specific waiver of any such privilege with respect to the material being produced or any subject matter thereof; or (c) a waiver of any other rights the Producing Party may have under any applicable law. Upon written request, accompanied by a good faith representation by the Producing Party that the production of privileged or otherwise protected materials was inadvertent, any inadvertently produced privileged materials shall be returned promptly to the Producing Party, with all copies destroyed and such destruction certified. In the event the receiving party disputes the claim of privilege or protection by the Producing Party and the parties are unable to resolve the dispute, the receiving party may then move the Court for an order compelling production of that material. The subject material shall not be used for any purpose until the Court has ruled on the motion.

19. **Violation of the Order.** The Court shall have discretion to impose sanctions, including reasonable monetary fines, for violations of the provisions of this Order governing the protection of material that is designated Confidential.

20. **Electronic Disclosure Protocols.**

- (a) **Production Format In General.** Unless otherwise specified herein, all documents (whether originally electronic or hard copy paper) should be produced as TIFF image files (black-and-white) in electronic form on a CD-Rom, or on other removable media. If the data cannot be converted to a TIFF image file, e.g., audio or video files, the data shall be produced in native format with a native file that corresponds to a specific placeholder document in TIFF format with a corresponding bates number. All images should be accompanied by a Concordance Opticon or Summation load file. Specifically, the TIFF images should be produced as a single-page Group IV TIFF format, with appropriate OCR. Except as noted in paragraph (c) below, each TIFF image should be individually Bates numbered (each party using a unique prefix of letters as appropriate, and each page having a unique number of at least six digits, with no separator between the letters and numbers). The Bates number must not obliterate, conceal, or interfere with any information on the produced document.
- (b) **Production Format from Electronic Format.** For Documents that are produced directly from electronic format, the full extracted text will be provided in the main (.DAT) load file. To the extent readily available at the time of retrieval, the extracted data and metadata (as required herein), related to the electronic documents produced, should be produced in the

Concordance DAT file format as well as in a Summation.dii file. The following extracted data and metadata fields are required to be provided in the Concordance and Summation load file:

FOR E-MAIL AND E-DOCS

BEGBATES
ENDBATES
BEGATTACH
ENDATTACH
CUSTODIAN
AUTHOR
PATH (ORIGINAL PATH FOR EDOCS, INBOX PATH FOR EMAILS)
SUBJECT (FOR EMAILS)
TO (FOR EMAILS)
FROM (FOR EMAILS)
CC (FOR EMAILS)
BCC (FOR EMAILS)
RECEIVED DATE (FOR EMAILS)
RECEIVED TIME (FOR EMAILS)
SENT DATE (FOR EMAILS)
SENT TIME (FOR EMAILS)
MESSAGE SOURCE (FOR EMAILS)
TEXT (BODY OF EMAIL FOR EMAIL, EXTRACTED TEXT OF
DOCUMENT FOR EDOCS AND ATTACHMENTS)
PARENT DOCUMENT (IF APPLICABLE)
FILE NAME (FOR ATTACHMENTS AND EDOCS)
FILE CREATE DATE (FOR ATTACHMENTS AND EDOCS)
FILE MODIFY DATE (FOR ATTACHMENTS AND EDOCS)

FOR SCANNED HARDCOPY DOCUMENTS

BEGBATES
ENDBATES
CUSTODIAN
OCR TEXT

- (c) **Production of Databases and Powerpoint Presentations.** Electronic data contained in access or excel databases, as well as powerpoint

presentations, shall be produced in native format with a single bates number instead of being converted to TIFF images.

- (d) **Use of Portions of Produced Information.** Any portions of information produced, including but not limited to, still images, video cuts, etc., that are created from information produced herein, shall be assigned the same Bates number as the source from which it was obtained and also be assigned unique letter suffix(es) thereto, in order to differentiate it from and/or associate it with the original produced information.
- (e) **Redaction Procedure for any and all Produced Information.** Redaction is permitted to protect privileged attorney-client or attorney work product information or personally identifiable information (such as social security numbers or bank account numbers). Redaction should be used as conservatively as possible, and reasonable effort shall be made to preserve the integrity of the information otherwise disclosed. The document shall be identified as being redacted in a manner that will not obliterate, conceal, or interfere with any information on the produced document. The Producing Party shall maintain a copy of the unredacted document complete with unmodified metadata in the event disputes must be resolved concerning the redaction or the metadata information provided.
- (f) **Production of Original Content.** Subject to appropriate redaction, the produced document shall convey the same information as the original document. Documents containing color need not be produced in color,

unless color is necessary to understand the meaning, content, use, or importance of the document, or the information contained therein.

(g) **Inadvertent Disclosure.** Inadvertent disclosure of privileged information shall not constitute waiver of any such privilege and shall be governed by Paragraph 18 of this Order.

(h) **Preservation of Produced Information.** The parties should maintain all electronic files and information produced in their native format for production if such production is later determined necessary to obtain other relevant information or to verify or investigate any aspect of the files or information produced, which may include review of the original document in color or retrieval of additional imbedded information.

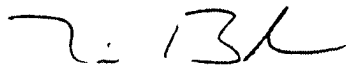
21. **Duration of Preservation.** The requirement to preserve information in its native format shall expire upon the conclusion of this Litigation (which shall expire once all appeal periods have expired).

22. **Continued Applicability of Fed. R. Civ. P. 26(c).** Nothing in this Order shall preclude any Party from applying to the Court for a Protective Order pursuant to Fed. R. Civ. P. 26(c) regarding the production of specific information or documents not otherwise subject to the provisions of this Order.

IT IS SO ORDERED.

09/10/2010

Date



Tim A. Baker
United States Magistrate Judge
Southern District of Indiana

**IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION**

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Defendants.)	

EXHIBIT A

I hereby certify my understanding that Material designated “Confidential” is being provided to me pursuant to the terms and restrictions of the Agreed Protective and Electronic Disclosure Order entered in this action by the United States District Court for the Southern District of Indiana, on _____, 2010 (the “Order”). The information being disclosed to me with this designation is confidential and for use only in this litigation and I agree to treat it as such. I have read and understand the terms of the Order, I agree to be fully bound by them, and I hereby submit to the jurisdiction of the United States District Court for the Southern District of Indiana for the purposes of enforcement of the Order.

Dated: _____

Signature: _____

Name: _____